Date: 19961107
Docket: A963340
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Shaw
Pronounced in Chambers
November 7, 1996

**IN THE MATTER OF THE
CHILD, FAMILY AND COMMUNITY SERVICE ACT**

IN THE MATTER OF:

THE CHILD: R.A.S.

BIRTHDATE: [redacted]

BETWEEN:

THE DIRECTOR OF CHILD, FAMILY and COMMUNITY SERVICE

APPELLANT

AND:

B.S.

RESPONDENT

Counsel for the Plaintiff: F.G. Potts and Robert N. Hamilton

Counsel for the Defendant: David Bellamy and Barry Long

[1] **THE COURT:** This is an appeal by the Director of Child, Family and Community Service from an order made by Judge D.J. Martinson of the Provincial Court on October 3, 1996.

[2] The background to this appeal is as follows. R.S. is 10 years of age. Her date of birth is October 30, 1986. She was born with fetal alcohol syndrome and spastic cerebral palsy. In 1990, R. came to the care of the respondent, B.S. In 1991, she was adopted by Ms. S. In August 1995, R. was hospitalized for persistent nausea, vomiting, diarrhea and pain. She has been in and out of hospital since that time. Various methods of tube feeding having been used to provide her with nourishment. With attendant infections, her life has been in danger.

[3] Many doctors have attended upon R. Some theorize that her feeding problems were deliberately caused by her mother. Others are of the view that there are other valid explanations for R.'s condition and that her mother is not the cause.

[4] The Director of Child, Family and Community Service, acting upon the views of those doctors who posed the theory that the mother is responsible, has taken steps to protect R. On July 8, 1996, the Director obtained an *ex parte* order in Provincial Court authorizing essential health care for R. and prohibiting her mother from attending British Columbia Children's Hospital where R. was a patient. The order was made pursuant to s. 29 of the ***Child, Family and Community Service Act***, S.B.C. 1994, Chapter 48.5. The order was served on the mother on the following day, July 9, 1996.

[5] The mother appealed the *ex parte* order on July 24, and by consent the matter was remitted to Provincial Court. On August 1, the Director, without a court order, took R. into his care. He did so under the power accorded to him by s. 30 of the ***Act***, where he has reasonable grounds to believe that a child's health or safety is in immediate danger.

[6] When the Director acts under s. 30, he is obliged by s. 34 to attend court for a presentation hearing within seven days. At the presentation hearing, the Director is required to present a written report as to the circumstances of taking a child into his care. The Provincial Court judge is empowered to make various interim orders as to what shall be done with the child. This is provided for by s. 35.

[7] The presentation hearing was commenced on August 6. The mother was represented by counsel; so was the Director. The question of what should be done was bitterly contested. The hearing continued on August 9, 18, 26, 27 and 30, and September 4, 6, and 18. The hearing judge was Judge Martinson. On October 3, she rendered judgment ordering:

1. That the Director have interim custody pending the next step in the process, that being the protection hearing under s. 40 of the ***Act***;

2. That the mother have supervised access to R. every Monday from 1:00 to 5:00 p.m.;

3. That the protection hearing commence within 45 days and "continue immediately thereafter".

[8] It is only with respect to the third aspect of Judge Martinson's order that the Director has brought this appeal.

[9] The part of the reasons for judgment relating to the setting of the date for the protection hearing are as follows:

> DATE FOR THE PROTECTION HEARING
>
> The new ***Act*** is designed to have child protection issues resolved quickly. The director is required to attend court for a presentation hearing no later than 7 days after a child is removed. The presentation hearing is to be concluded as soon as practicable in the circumstances. When an interim order is made the court must set the earliest possible date for the protection hearing. The date for the commencement of the protection hearing must not be more than 45 days after the conclusion of the presentation hearing. The protection hearing must be concluded as soon as possible.
>
> In spite of these statements in the legislation indicating that matters must be dealt with quickly a practice developed under the former ***Family and Child Service Act*** has continued under the new ***Act***. That is, the commencement of the protection hearing within 45 days is technically met by a brief court appearance on a day when many other cases are set, known as a remand day. At that time, some documents are filed so that the hearing can be said to have commenced. The actual hearing is then adjourned to another date which can be many months away.

> This may meet the letter of the law but certainly not its spirit. The main reason it happens is that there are insufficient resources, including available judges, to actually have most hearings within 45 days. It is not in the best interests of children to have new child welfare legislation passed to protect them and then not provide the resources to allow the legislation to be implemented.
>
> The need to have a protection hearing quickly is particularly compelling in this case. R. has not seen her mother for nearly three months, since July 8th. I have already emphasized the polarization of the medical evidence. If the doctors at Children's Hospital are right, an early decision is in R.'s best interests. If it is determined that she is not in need of protection, a prolonged separation could do irreparable harm.
>
> I therefore direct that the trial coordinator set the protection hearing to commence within 45 days from today, to continue immediately thereafter. The court will make arrangements for this to happen in this unusual case. A case conference is to be set forthwith. However, in the particular circumstances of this case, the need for a case conference can be waived with the written consent of both counsel. It is hoped that plans move forward quickly to have an independent, multidisciplinary assessment conducted.

[10] The Director takes four points on this appeal:

1. That Martinson, P.C.J. did not have jurisdiction to fix the dates for the protection hearing;

2. That she failed to correctly apply the law as it pertains to fixing dates for protection hearings;

3. If she had jurisdiction and correctly applied the law, she failed to properly exercise her jurisdiction because:

   (a) there was no application before her to fix the hearing dates; and,

   (b) she did not provide counsel the opportunity to make submissions on this subject; and

4. Alternatively, she wrongly exercised her discretion on the particular facts.

I will deal with each of these contentions in order.

1. **Jurisdiction**

[11] In setting the dates for the protection hearing, Martinson, P.C.J. was acting under s. 37(1) and (2) which read:

> **37.** (1) When an interim order is made under s. 35(2)(a) or (b), the court must set the earliest possible date for a hearing to determine if the child needs protection.
>
> (2) The date for commencing the protection hearing must not be more than 45 days after the conclusion of the presentation hearing and the protection hearing must be concluded as soon as possible.

[12] In my opinion, the jurisdiction conferred by s. 37 is clear. Judge Martinson was obligated -- "must" -- to set the

hearing date and do so for the earliest date possible with the commencement date not being later than 45 days from the conclusion of the presentation hearing.

[13] The Director argues, however, that Judge Martinson erred in adding that the protection hearing is "to continue immediately thereafter". He contends that this aspect of the fixing of the hearing date runs contrary to s. 48 of the ***Act*** which allows the Director to withdraw from a proceeding.

[14] I do not agree. In my opinion, the expression "earliest possible date for the hearing" is sufficiently broad to include not only the commencement date but also the time thereafter that may be required for the hearing. Although the setting of the commencement date will generally suffice, it being implied that the hearing will carry on and "be concluded as soon as possible", I do not believe that Judge Martinson overstepped the bounds of her jurisdiction in directing that the hearing will "continue immediately thereafter". Whether she should have done that in the particular circumstances is a point I will address later on under ground number 4.

2. **Application of the Law**

[15] This ground aims at the following passage from the reasons for judgment of Martinson, P.C.J., which I repeat:

> In spite of these statements in the legislation indicating that matters must be dealt with quickly, a practice developed under the former ***Family and Child Service Act*** and has continued under the new ***Act***. That is the commencement of the protection hearing within 45 days is technically met by a brief court appearance on a day when many other cases are set, known as a remand day. At that time some documents are filed so that the hearing can be said to have commenced. The actual hearing is then adjourned to another date which can be many months away. This may meet the letter of the law but certainly not the spirit.

[16] The Director contends that the practice set out in the foregoing passage is by law equally applicable under the present statute. The Director relies upon three decisions of this court which in effect gave validity to the practice under the former statute: ***Superintendent of Family and Child Service v. W.V. and L.V.*** (1986), 1 R.F.L. (3d) 85 (B.C.S.C.); ***Wulff v. Superintendent of Family and Child Service of British Columbia*** (unreported) February 20, 1991, Vernon Registry No. 4038-90 (B.C.S.C.); ***Superintendent of Family and Child Service v. A. et al*** (1991), 32 R.F.L. (3d) 209 (B.C.S.C.).

[17] In my view, those cases are not applicable to the new statute. In my opinion, the former practice insofar as it was built upon a virtual fiction of a hearing date, the actual hearing commencing on a date set in remand court, is no longer valid under the new statute. I say so because the present ***Act*** in various provisions that were not in the earlier ***Act*** makes it clear that timeliness of disposition of child protection cases

is not only desirable but is obligatory. I cite the following provisions:

> **2.** This Act is to be administered and interpreted in accordance with the following principles: ...
>
> (g) decisions relating to children should be made and implemented in a timely manner.
>
> . . . .
>
> **4.** (1) Where there is a reference in this Act to the best interest of a child, all relevant factors must be considered in determining the child's best interests including, for example: ...
>
> (g) the effect on the child if there is delay in making a decision.
>
> . . . .
>
> **34.** (1) No later than 7 days after the day a child is removed under section 30, a director must attend the court for a presentation hearing.
>
> . . . .
>
> **35.** (4) A presentation hearing is a summary hearing and must be concluded as soon as practicable in the circumstances.
>
> . . . .
>
> **37.** (1) When an interim order is made under section 35(2)(a) or (b), the court must set the earliest possible date for a hearing to determine if the child needs protection.
>
> (2) The date for commencing the protection hearing must not be more than 45 days after the conclusion of the presentation hearing, and the protection hearing must be concluded as soon as possible.

[18] In my view, s. 37 in its wording and in the context of the other provisions I have set out above reflects the

Legislature's intention that the judge presiding at the presentation hearing set a real hearing date for the protection hearing, not simply set the matter over to remand court for a *pro forma* hearing and the setting of the real hearing date at that time.

[19] Martinson, P.C.J. went on in her ruling to say:

> The main reason it happens [referring to the former practice] is that there are insufficient resources including available judges to actually have most hearings within 45 days. It is not in the best interests of children to have new child welfare legislation passed to protect them and them not provide the resources to allow the legislation to be implemented.

I agree with Judge Martinson. The requirements of the new ***Act*** are clear. The Legislature's intent, in my view, is clear. If further resources are needed to cope with the ***Act***'s requirements, it is up to government to provide those resources.

3. **Exercise of Jurisdiction**

[20] The Director contends that Martinson, P.C.J. erred in fixing the protection hearing date because:

(a) There was no application before her to do so; and

(b) She accorded no opportunity to counsel for the Director to make submissions.

[21] As to point (a), the judge did not need an application before her. She was mandated by s. 37(1) to fix the date at the time she made the interim order pursuant to the presentation hearing. The law required her to do what she did, whether or not an application was made. She simply followed the law.

[22] As to point (b), I have reviewed the transcripts of what occurred before Martinson, P.C.J., and am satisfied that counsel was not precluded from making submissions. In my view, there is no substance to this point.

4. **Exercise of Discretion**

[23] In the circumstances of this case, I am of the view that I ought not to interfere with the discretion exercised by Judge Martinson.

[24] The Director submits that in view of the extensiveness of the investigations that he says need to be carried out, the dates set by Judge Martinson impose too tight a schedule.

[25] On the other side is that R. has been deprived of her mother for almost four months. Even now R. is in a foster home in Vancouver while her real home -- her mother's home -- is in Kamloops. It is readily apparent that the limited access of every Monday afternoon is extremely inconvenient.

[26] There are competing dangers:

1. That the mother may be a danger to R.; and

2. That R. will be harmed by being deprived of the bonds of love, affection and care with her mother.

[27] I am satisfied that Judge Martinson did her best to balance those interests. I should not try to second-guess her exercise of discretion.

[28] I add this. It is open to the trial judge who has already been assigned to the case to organize the trial and grant any adjournments that may be necessary in order to ensure that the hearing is fairly conducted. The words in s. 37(2), "the protection hearing must be concluded as soon as possible", do not suggest that the trial judge's responsibility to ensure that the hearing is fair is abrogated. The parties need not wait until the hearing date to apply to the assigned trial judge for any directions that may be necessary. However, the

substantive hearing must commence within the 45 day period from the conclusion of the presentation hearing. The trial judge must require that the hearing get underway in a real rather than simply a *pro forma* sense. I leave to the trial judge the question of what will suffice.

[29] The Director pointed out that after Judge Martinson's order a case conference was held before another judge pursuant to Rule 2 of the Provincial Court ***Child Family and Community Service Act*** Rules. At that conference, the judge said she was bound by the direction given by Judge Martinson and any adjournment would have to go before the assigned trial judge. There is no appeal from that ruling, and I do not think I should comment upon it. The Director contends, however, that Rule 2 should restrict the interpretation I have given to the judge's jurisdiction under s. 37 of the ***Act***. I do not agree. The Rules do not alter the law as set out in the statute.

[30] During the hearing before me, I raised the question as to whether this appeal was authorized by s. 81(1) of the ***Act***, which reads:

> **81.** (1) A party may appeal to the Supreme Court from an order of the Provincial Court made under this Act.

[31] Respondent's counsel at the end of the hearing took the position that the decision of Judge Martinson with respect to the protection hearing date may not be a proper subject of appeal. Counsel for the Director took the opposite view.

[32] I have decided in the exigencies of this case to render this decision on the assumption, but without so finding, that an appeal does lie from Judge Martinson's decision on the point raised on the appeal.

[33] For the foregoing reasons, the appeal is dismissed.

[34] I order the Director to pay the costs of the respondent.

"D.W. Shaw, J."

Mr. Justice Shaw